Central Law Journal.

ST. LOUIS, MO., SEPTEMBER 10, 1909.

THE ARKANSAS STATUTE OF DESCENTS APPLIED TO ALLOTMENTS IN INDIAN LANDS—DO ALLOTTEES TAKE BY PURCHASE OR DESCENT?

In advance of the decision in the case of Schulthis v. McDougal, 170 Fed. Rep. 529, being published, we learned, that the case had attracted very great attention. For this reason we have waited with some interest for it to appear. Not only to Oklahoma lawyers, but to the profession at large, ought its perusal to be of interest. To our mind there is disclosed in it a sort of reasoning, by a very able court (Eighth Circuit Court of Appeals) which ignores accepted canons of construction and the guidance of the common law.

We do not intend this criticism to apply to the entire opinion in the case, but only to that part which speaks of the inheritable quality, under the Arkansas statute of descents and distribution, of an allotment, vesting title in severalty to a particular tract in the common lands of the Creek Indian Nation, as provided by act of congress pursuant to treaty agreement.

To our general readers it should be explained that in 1902, what appears to have been something of a vexed question in that portion of the State of Oklahoma which formerly constituted the Indian Territory, was set at rest by making this Arkansas statute apply to decedents who were allottees of lands belonging to the Creek Nation.

One would naturally suppose this to be a very practical step toward avoiding confusion in the future. The Indians were abandoning their code as to descents and distribution for the evident reason that courts unused to their traditions and customs would have to construe their laws. Therefore, the only equivalent for the sacrifice must be a system not subject to the doubtful course of pioneer decision. Where might certainty in construction be supposed to exist? Not, surely, in a new set of laws, whose meaning would have to be threshed out through years of litigation. It were better to suffer the ills they had than fly to those they knew not of. Therefore, they turned to the ancient law of a contiguous state and the settled construction thereof acquired in its existence of sixty years.

What situation can be imagined in more urgent need of settled construction than that of this Indian tribe, disbanding and apportioning their wide domain of common lands to its members in several ownership? This dependent people, with the dominating white man in their midst, must suffer peculiar injustice, if their patrimony is to be stripped of its value by doubt and uncertainty. The lack of certainty could be of benefit to no class of whites but those wishing to purchase their birthright with a mess of pottage.

Therefore, it would seem to be against the entire theory of adoption of the Arkansas statute for any court to look to any source for the meaning of its terms than Arkansas decisions. When this chart and compass failed to direct, then resort should be to the common law, which long has been the rule of practice and decision in that state. We fail to find in the opinion in the Schulthis case one Arkansas ruling upon the meaning of the statute to be construed nor any reference to common law authority. Is there any Arkansas decision which considered that part of the law on which the Schulthis case turned? That part reads as follows: "But if the estate be a new acquisition, it shall ascend to the father for his lifetime, and then descend in remainder to the collateral kindred of the estate in the manner provided in this act." The Supreme Court of Arkansas determined, in 1855, what "a new acquisition" was, and that ruling has been approved and applied in later cases. See Kelly's Heirs v. McGuire, 15 Ark. 555. Here is what was said: "A new acquisition, or newly acquired estate, does not afford, of itself, an exact idea of the mode of acquisition. By the common law, there were two modes of acquiring an estate—distinguished by the general appellations of descent and purchase. * * * It must be understood,

however, that a new acquisition in the sense intended by the statute, is one which the intestate has acquired by his exertions and industry, or by will or deed of a stranger. In other words, it is an estate derived *from any source other than descent, devise or gift from father or mother or any relative in the paternal or maternal line.*" (Italics ours.) Thus we understand that an ancestral estate under the Arkansas statute includes everything inherited, devised, given or bequeathed by an ancestor, while title by descent at common law was that acquired by an heir as in cases of intestacy. To the extent only, therefore, that title by descent is thus enlarged, is title by new acquisition differentiated or distinguished from title by purchase, and under the Arkansas statute, just as at common law, there could be no title by descent unless it presupposed an ancestral estate. With these exceptions as to gift and devise not considered, it is perceived, that title by a new acquisition is precisely the same as title by purchase. Thus a title acquired by statutory donation to actual settlers of lands forfeited for nonpayment of taxes was held to be "a new acquisition." Hogan v. Finley, 52 Ark. 55. And so, that by patent to public land under the laws of the United States, though the patentee was an infant and without the legal capacity of a pre-emptioner. Magness v. Arnold, 31 Ark. 103. Applying the term to what is acquired through statutory donation under laws of the state, and to that through compliance with public land laws of the United States, shows the same adaptation as in the word "purchase."

It seems a strange reason for not applying this rule to an allotment of Indian land to say: "It needs but a moment's thought to see that where this statute was applied to the lands of the Creek Nation, it was applied to a subject matter entirely different from that which was in the mind of the legislature of Arkansas." What difference does that make when it is in the mind of the lawmaker years after, to apply it to just such lands? Did the Arkansas court stop to wonder whether benefits under donation and pre-emption statutes were in the mind of the legislature of Arkansas? The federal supreme court has not been denying application of the federal constitution to situations which its framers never anticipated, and it has ever been considered the glory of the common law that there is, in its expansibility, principles suited to modern conditions.

But when the statute contains the equivalent of the common law phrase, "title by purchase," we think it strange for a court to say its originator more than fifty years ago did not know about such a thing as Indian allotments. Sufficient answer to this would be that no other part of the statute would apply either and, therefore, the whole legislation is futile.

But, viewing title by "new acquisition," as practically the same thing as "title by purchase," then the only inquiry is whether title by allotment is title by descent, for if it is not that, it must be title by "new acquisition." It was easy for the court to determine that it was not, according to the common law or the Arkansas statute, title by inheritance, because no one but the allottee ever held title in severalty to the land in question. Therefore he derived the title through no other, and certainly not through the father any more than through any other member of the tribe. In him, therefore, it was "a new acquisition," in one sense at least. But the court says: "It came to him by the blood of his tribal parent and not by purchase * * * His father was the only parent through whom he derived his right." This were better expressed so as to show the real fact as follows: "It came to him because his blood was the same tribal blood as that of his father. His mother was not of that tribal blood." But, if it would have come to him, *because* of his tribal blood, what difference does it make in his rights as allottee how that blood came to course in his veins? He did not inherit the allotment from his father through his father's blood, but through his own blood. The manner in which he obtained it was by operation of law. He was within the description of persons entitled, as his father was, and to the father as to him there was a newly acquired estate, or "a new ac-

quisition." That acquisition was just as independent of the one his father acquired as it was of that of any other member of the tribe. The statute of descents interested itself in but two things: Was the property ancestral, that is, previously owned by an ancestor and inherited from, or devised or given by, him, or did the title come into the intestate in another way? The statute is clear.

When the court goes beyond such an inquiry and by construction puts the title in the ancestor, it not only overturns the ancient maxim of *nemo est haeres viventis,* but it sets aside utterly the new acquisition clause of the Arkansas statute. This is clear from the fact that an allotment has but one chance, if any, to be "a new acquisition" and that is, when it vests in the allottee. If the clause cannot then operate, it merely cumbers the legislation. The entire statute concerns allottees and allottees only. A present day lawgiver said all of its terms applied to allottees. What right had the court to eliminate a part? And how could ignorance of the ancient legislature of Arkansas of Indian allotments affect the intent of Congress adopting the same form of words?

Having said this much to show the inherent unsoundness of the decision of the Eighth Circuit Court of Appeals, it may be well to conclude this discussion with an extract from the opinion of Judge Hook, in the case of Ligon v. Johnston, 164 Fed. 670, in speaking of the title to Choctaw and Chickasaw lands. Judge Hook concurred in the opinion written by Judge Amidon in the Schulthis case, who said in the latter case, that because "the division of its (the tribe's) property was far more nearly akin to the partition among tenants in common than the grant of an estate by a sovereign owner, * * it cannot be said that the property which passed to an allottee is a new right or acquisition created by the allotment." As an answer to this, we quote from Judge Hook in the Ligon case as follows:

"That the lands involved were public lands, belonging to the Choctaw and Chickasaw Nations and not to the individual members, has been assumed without contradiction from the inception of their titles through a long sequence of acts of congress and treaties and agreements with the tribes. True, as contended, the title so held has frequently been referred to as being held in trust for the members of the tribes, but it is only so in the broad comprehensive sense in which the public property of any government is in trust for the welfare of its people. Until specific, private, individual rights attach pursuant to law, the enforcement of such trusts must be at the bar of public conscience. They are not justiciable in the courts."

If the son's right was not justiciable prior to the allotment, was it a legal right, that was transmissible? If not, and it became a legal right by allotment, it was "a new acquisition" within the meaning of the Arkansas statute.

In these days it would seem to be asking a great deal of any court to preserve strict consistency with itself, but least of all might we fairly hope that some twenty odd judges, eligible for sitting in a single court of appeals, three or four at a time, should succeed. But it happened that Judge Hook sat in both of these cases.

NOTES OF IMPORTANT DECISIONS.

SALES—RIGHT OF RESCISSION.—The facts in the case of Peoples State Bank v. Brown, decided by Supreme Court of Kansas, extend the period of the right of election, so at least as to make the question one for the jury, as far as we remember to have seen. 103 Pac. 102. The facts of that case were that a farmer brought a wagon load of wheat to a Kansas town and selling it to an elevator man, received his check therefor. The transaction occurring after banking hours, he took the check home with him and two weeks later presented it at the bank and payment thereof was refused. A week prior to that time, the drawer of the check becoming insolvent, the bank, which had been cashing checks for the drawer on bills of lading for grain shipped by him, attached for its debt. It was thought that the facts did not show conclusively that there was an intention on the part of the

seller that title should pass, so far as to prevent the seller from reclaiming his wheat, as against one who was in no way prejudiced because of an intervening right—a mere lien by attachment not being such a right.

The court said: "To say that to preserve his right of reclamation it was necessary for him to present the check not later than the day after he received it would be to establish too vigorous a rule. And, after passing that limit, there seems to be no place where a hard and fast line can be drawn dividing reasonable and permissible delay from that which is unreasonable and prohibited. If the failure to make an earlier presentation did not bar him, his subsequent conduct did not have that effect, for within a short time after learning of the failure of the drawer he claimed ownership of the wheat, and, although he did not bring his action at once, he never thereafter ceased to assert his right to do so."

Some of the cases cited show the court did, as a matter of law, declare that the time for reclaiming had passed, and it would seem, that where a sale is made to one who according to a regular course of business is shipping away every day what is purchased, the seller should be conclusively barred from reclaiming unless immediate steps are taken to reclaim. It greatly looks like the Kansas court should have said, that the attempt to reclaim was purely an afterthought.

HUSBAND AND WIFE—ACTION FOR TORT BY ONE AGAINST THE OTHER.—The Supreme Court of California, in which state exist the usual modern legislation in respect to separate property of the wife, contracts and her suing and being sued alone, considers the question whether this departure from the common law authorizes one partner to the marriage relation to sue the other for a tort. See Peters v. Peters, 103 Pac. 219. The court refers to the statutory declaration that the common law of England is the rule of practice and decision in that state, and, then argues that the general purport of its legislation in regard to married women is in respect to their property and contract rights.

The view of the court is that the intent of these statutes ought not to be extended by any construction so as to allow one to bring an action against the other for an injury to person or character, is "contrary to the policy of the law and is destructive of that conjugal felicity which it has always been the policy of the law to guard and protect."

We suppose this was the same reasoning, that prevented the common law from extending to the wife all of the rights in regard to property and the making of contracts with which statutes have invested the wife, and it might be thought by many that as the common law policy in certain respects in regard to the wife has outlived its usefulness, so it has in others. This consideration goes to the interpretation of general language, and the rule of what is in derogation of the common law being strictly construed might itself be sufficient to exclude actions in tort by one against the other. The cases in which the question of the right of suit has been raised have almost, if not quite, always been where the wife was suing. The California case is somewhat unique in being the suit of a husband against a wife for her "shooting him in the leg with a shot gun." If that action were sustained the old theory of the common law of the wife being under the dominion of the husband would seem to have been thoroughly destroyed, or at least that the presumption is one that is greatly rebuttable.

DIVORCE LAWS.

Divorce has lately been made the subject of discussion and agitation by various social and religious organizations, and many persons are deploring the alleged "Laxity of Divorce Laws." As usual, the troubles growing out of this matter are assumed to be due to defective laws rather than to the abuse of or improper administration of good laws. The fact is that the difficulties which have arisen have been chiefly due to the abuse of or maladministration of the laws covering the marriage relation and divorces.

There is, however, one particular matter in which the method prescribed for procedure under the divorce laws is defective. It is generally recognized that there are three parties to every divorce proceeding, viz.: the two parties to the marriage relation and the public or state. In most states the public end of the case is left to the anomalous representation by the court instead of making provision for the county or public attorney to regularly represent the interest of the public or state. In a few of the states such provision exists. In most of the states, and even in those having such provision, the net result in some particular

cases has often been far from satisfactory.

There is quite a persistent agitation and demand for more legislation on the subject of divorce, and for the making of divorce laws and procedure more stringent. And there are those who advocate federal divorces, as a way out of the difficulties, the utter fallacy of which will presently be shown. Many of those who clamor for legislative action are almost entirely ignorant of existing laws on this subject.

The Presbyterian Generai Assembly, which was in session in Denver in May, 1909, it seems had a special committee on marriage and divorce, and this committee in its report, among other things, says: "The census tells a story (concerning the number of divorces) that surprises the people and shames a Christian nation." * * * "Although it is a fact to be deplored that this scandal and sin and sorrow resulting from the *laxity of law* that makes divorce and speedy remarriage possible, show sad and shameful continuance, and that the efforts to resist and lessen evils that threaten the permanence and purity of the family life, the stability of the state, and the life and power of the church seem unavailing, yet the united efforts of the churches, of national and state officials and organizations of the bar association of the United States, and conspicuously the faithful and persistent work of the national divorce congress, which invited the representatives of the inter-church conference to confer with it, encourage us to believe that the movement has made great progress and hope that reforms will be accomplished which will in time wipe out much of the dishonor and disgrace that makes Christian America conspicuous in permitting a laxity that makes our record one of shame." Assuming that those who submitted the foregoing and similar reports have grounds for making the sweeping assertions and reason to deplore the shameful conditions, the r*eform* expected cannot be attained through the enactment of more statutory restrictions. That there is a marked increase in the number of divorces, and that there has been some laxity in the granting of them cannot be disputed, for statistics amply show this. But statistics do not, and indeed could not show the real reason for such conditions. But those who attribute this all to laxity in the law itself are wholly in error. It is not so much to be desired to lessen the number of divorces as it is to guard against improper and unjust divorces being granted. It seems these people are confusing the deplorable conditions really existing, for which the laws are not responsible, with the provisions of the law for the relief of such conditions—the improper conduct of parties in cases, with the laws of which they seek to avail themselves. The conditions necessarily existed before law or statute could become operative, and they would be no less deplorable if there were no statute on the subject.

The grounds given by statute for divorce vary somewhat in the different states. Adultery, desertion, gross neglect of duty, neglect and failure to support are grounds for divorce in all states. Some have, in addition, extreme cruelty, habitual intoxication or drunkenness (in some this is "habitual intemperance," and includes the use of drinks or drugs other than alcoholic, in North Dakota, for instance), incurable insanity, and conviction and imprisonment for graver crimes—felonies or infamous crimes. In others, among the causes for divorce are specified the usual grounds for annulment—such as, when either of the parties had a former husband or wife living at the time of the marriage—when the wife at the time of the marriage was pregnant by another than her husband—fraudulent contract, and impotency. Discretionary divorces have been abolished in all but one of the states—Washington. The procedure provided for obtaining jurisdiction of the parties and the status conforms in the main to that in the case of other civil matters, with similar necessities, for jurisdiction of the parties and the res. Decrees by default, or pro confesso, are provided against, and in most states there is required to be corroborating evidence from persons other than the interested parties. Connivance and collusion always preclude the decree.

It will scarcely be claimed that any of these grounds for divorce should be abolished, or that the procedure should be more difficult or stringent. That divorces have been granted in cases where they ought not to have been is freely conceded, but this was due, not to the law, but to falsehood of the parties or the fault or misfeasance of those charged with the application and enforcement of the law.

The marriage relation is regarded as a distinct thing. It cannot be created without the mutual consent and co-operation of the man and the woman, and the sanction of the state, and when so created it cannot be dissolved except on statutory grounds and with notice to each of the parties interested. The divorce or dissolution action acts more upon the relation or status than it does upon the personal rights of the husband or wife. In legal contemplation the husband, as the provider for the family has the right to choose the domicil or place of residence for the family, and it is the duty of the wife to submit to his choice. Hence it is presumed that the domicil of the husband is the domicil of the wife, and so of the situs of the marriage relation or status. If in a given case the husband should wrongfully absent himself from the marriage domicil, he does not take with him this marriage status, and the state to which he removes for any purpose inconsistent with the marriage duty or the provisions of law, would not obtain jurisdiction of the marriage relation, and could not legally take any action affecting it. In other words, the marriage relation the thing to be acted upon in a divorce case, remains with the innocent party. The site of the relation can be changed only by the married parties when acting consistently with the marriage duties and with law. The statutes of the different states provide the length of the time of residence which must elapse before the court can take jurisdiction of a divorce case, and even where both man and wife are present and before the court, neither urging objection as to time, the court cannot grant a decree where the residence has not been for the statutory time. This shows that the status or relation, as a separate or distinct entity is the real thing acted upon or proceeded against, rather than the parties. In most states the statute makes provision for notice or service of process by publication on non-resident or absent parties defendant in these cases, where it is made to appear that the relation or status has been legally brought within the jurisdiction of the court. Here there often is too much laxity, not in the statutes governing, but in the manner of their application. The notice or summons which is published is often not in statutory form, or the preliminary affidavits are often defective; or the statutory requirement that a copy of the petition or complaint be transmitted to the last known place of residence of the absent party is not observed, and a decree granted in spite of the irregularities, reciting, however, that the jurisdictional steps have been taken. This, as a matter of law, closes the door to collateral attack, and injustice is done—that is, the whole case does not work out and the record does not express the real truth. Clearly, all this is not the fault of the law itself, but fault lies in its indifferent observance.

In some of the so-called default cases the evidence, though meagre, is yet legally sufficient to warrant the court in granting the decree, and it would be an abuse and even reversible error, should a decree be denied. It is too often true, however, that the testimony adduced is false, its falsity not being readily discoverable at the time by the judge. "There is no class of cases," says the court, in Stilphen v. Stilphen, 58 Me. 508, "in which the court is so liable to be imposed upon, and a decision obtained contrary to the truth as exparte divorce suits. The notice is often imperfect, so the confession of guilt implied in the default is deceptive, and it is well known that witnesses testifying in the presence of one of the parties and in the absence of the other will so alter and magnify the faults of the absent, and suppress everything that makes against the present, that it is impossible to tell where the truth and real merit of the controversy lie. When both

parties are present, each is sure to put the other in the wrong, and, a fortiori, is this true when one of the parties is permitted to testify in the absence of the other, as is now the case in divorce suits." In some of the divorce cases where service is by publication, the plaintiff is not a bona fide resident of the state where the case is brought, which, as the law is, it is imperative that he should be, and so the marriage relation or status is not in fact within the jurisdiction of the court. It is often impossible for the adverse absent party to come from a distant state to enter an appearance and make a defense. Sometimes, too, the notice is published in an obscure country paper, and the absentee really knows nothing about it—has in fact neither knowledge nor notice of it. In other cases the plaintiff is himself quite likely the guilty party, and the allegations of desertion or other grounds alleged against the defendant, are not really true. Then, in still others, if the real facts were made to appear, it would develop that both husband and wife have violated the marriage vows, and this would constitute such recrimination as would prevent the granting of the decree. Then, in many cases a subsequent marriage is in contemplation, and often is the real motive force behind the case. If this appeared the court would far more closely scrutinize the matter, and likely no decree would be granted. In all of this, manifestly, the law and procedure are not at fault, for to make these more stringent or rigorous would only result in hampering the administration of justice in meritorious cases, and would not prevent these abuses by the parties themselves, for in last analysis it is all due to their false attitudes and oaths. "The rule is well settled that while a judgment or decree may sometimes be impeached for fraud, it can only be for a fraud extrinsic to the cause, as, that the judgment was collusively obtained to defraud some other person; and that it cannot be impeached by either of the parties thereto by reason of false testimony given at the time, or which must have been given to establish the plaintiffs' case, or even by perjury of one of the parties thereto. Granting that the testimony shows the absence of good faith and even perjury on the part of the husband in the case, the decree cannot be opened for that reason, or for any reason which would not logically involve a re-examination of the entire facts upon which the decree is obtained."[1]

There being in fact three parties to every divorce proceeding, the husband, the wife and the public or state, if provision were made by statute everywhere that the county or district attorney, or some other officer, had the duty to represent this third party, the state, in every divorce case, and if such public attorney observed that duty strictly, much of the abuse incident to divorce litigation could and would be obviated. Such an official would rather help-than-hinder the obtaining of decrees in cases where the real facts entitled the party applying to relief. This would not change the deplorable social conditions which have become the subject of remark, for as already observed the cause for these is not in the marriage and divorce laws, but it would in a large measure prevent the abuse of the laws and the process of the courts—it might not purify the atmosphere, but would preserve the courts and laws from contamination by it. This idea is not new, for as already noticed, it is now in operation in some form or other in several of the states—Colorado, Georgia, Indiana, Kentucky, Louisiana, Michigan and Oregon, and it was formerly the practice in Scotland to have the procurator-fiscal look after the interest of the public in divorce causes, though both parties were likewise represented by counsel.

Later the statute of 24 and 25 Victoria, C. 86, sec. 8, made it "competent to the lord advocate to enter appearance as a party in any action of declarator of nullity of marriage or of divorce; and, to lead such

(1) Christmas v. Russell, 5 Wall. 290; United States v. Throckmorton, 98 U. S. 61; Simms v. Slacum, 3 Cranch. 300; Amidon v. Smith, 1 Wheat. 447; Smith v. Lewis, 3 Johns. 157; Marriot v. Hampton, 7 T. R. 269; Demerit v. Lyford, 27 N. H. 541; Peck v. Woodbridge, 3 Day, 30; Dilling v. Murray, 6 Ind. 324; Homer v. Fish, 1 Pick. 435; Lewis v. Rogers, 16 Pa. 18; Sidensparker v. Sidensparker, 52 Me. 481.

proof and maintain such pleas as he may consider warranted by the circumstances of the case; and the court shall, whenever they consider it necessary for the proper disposal of any action of declarator of nullity of marriage or of divorce, direct that it be laid before the lord advocate, in order that he may determine whether he should enter appearance therein," etc.

The present English statutes[2] provide, "that every person seeking a decree, etc. * * * shall together with the petition or other application for the same, file an affidavit verifying the same, so far as he or she is able to do so, and stating that there is not any collusion or connivance between the deponent and the other party to the marriage." And 23 and 24 Vict., c. 144, sec. 7, that "where collusion is suspected the Queen's Proctor may intervene."[3]

The scope and effect of the laws in general on the subject under consideration are well expressed in the text of the American & English Encyclopaedia of Law, (Vol. IX, p. 728—2nd Ed.) "The state is interested in the preservation of the marriage relation, since this relation is promotive of morality and inures to the perpetuation of its citizens. Any contract restraining marriage, or promoting divorce is contrary to public policy. The *state permits the dissolution of marriage only where the purpose* of the *relation has been defeated* by grave and serious misconduct. Such misconduct must, on an application for divorce, be established by competent evidence of a full and satisfactory character. A cause for divorce cannot be established by default, consent or admission of the parties, as public policy requires that the misconduct be established otherwise." The period of bona fide residence required of the plaintiff before commencing an action for divorce is different in the different jurisdictions, in some it has been, and even now, is only three months. This shortness of time has often been criticised. In some other states the required time is two and even three years. Clearly justice and law are concerned rather with the good faith than the length of time of residence of a plaintiff. The bona fides of a two years' or a two months' residence may be pretended with equal facility, although the requirement of the longer period may not be so likely to abuse. The scrutiny should be directed to not how *long*, but in what *faith* has the plaintiff been in the jurisdiction where he brings his action. In bad faith, neither the long nor the shorter residence will bring the *status* with him to be acted on by the court. It is difficult to conceive a reason for a different rule in divorce than in annulment cases, or, for that matter, in any other civil cases. In any case, where one comes into a jurisdiction for the sole purpose of bringing a suit, to avoid a defense, or other improper ulterior motive, this is an abuse of legal process, and his action, of whatever nature, cannot be maintained therein. It should be borne in mind that there may be instances where a party justly entitled to maintain a divorce action comes into a state in all good faith, for reasons quite separate and distinct from the exigencies of the action, where it would be wholly improper and unjust to hamper him with the long residence restriction. Where the cause of action is complete, there is no just reason why the action should not be permitted to be brought at any time. The wrong that some will swear to a bona fide residence, when it is, in fact, in bad faith, can never make a right as applied to the case just supposed.

The case of Haddock v. Haddock,[4] quite harshly jars all one's former conceptions of the law on this subject, and while the court doubtless had the laudable purpose of checking the wholesale divorce business, by the constructive service or publication route, it seems to have come very close to disabling the "full faith and credit" clause of the federal constitution. The decision is out of harmony with nearly everything which had theretofore been determined in

(2) 20 and 21 Vict., c. 85, sec. 41.

(3) Drummond v. Drummond, 2 Swab. & T. 269; Gray v. Gray, 2 Swab. & T. 263; Cox v. Cox, 2 Swab. & T. 603; Wilson v. Wilson, L. R. 1, P. & M. 180; Gladstone v. Gladstone, L. R. 3, P. & M. 260; Hudson v. Hudson, 1 P. D. 65.

(4) 201 U. S. 562.

regard to divorce cases. As is often evident in such cases, the dissenting opinions correctly state the law. The majority opinion proceeds upon the idea that a divorce action acts in personam only, and that where one of the parties, who happens to remain in the state where the marriage was solemnized, is served by publication, in an action for divorce brought by the other, who left such state, and brought the action in another state, that a decree rendered in such action, on such service is void as to the party remaining in the original state, but is valid as to the other party in the state where granted, and in as many more states as are willing to recognize its legality as a matter of comity between the states. Now, if the action were a personal one, merely, one of the parties not having been personally subjected to the jurisdiction of the court, it is hard to understand how a decree could be regarded as amounting to anything anywhere. The fact that the court recognizes that the decree granted in the state of Connecticut is valid there, shows that it was thought that there was something before the Connecticut court besides the person of the plaintiff, for the court to act upon; that the res—the marriage relation or status was present also. If Haddock was divorced in Connecticut, he must necessarily be so everywhere, quite independently of the full faith and credit clause, even. If the Connecticut divorce was of *any* validity, then the bonds of matrimony existing between the parties must have been severed and dissolved, and the marriage relation determined, for it surely could not remain intact as to one and severed as to the other party to it. If once dissolved or severed, they could not by a sort of legal fiction re-unite. True, such a determination in a default case upon publication service, cannot affect rights of the absent party not depending upon the continuance of the marriage status or relation.[5]

What the majority of the court in the Haddock case doubtless felt, but did not, and as a matter of law, could not hold or express, was this: That Haddock, in obtaining his decree in Connecticut, practiced a fraud upon that court in claiming that his wife, who remained in New York, where they were married, was guilty of deserting him, when in fact he was himself the deserter, and this idea came from Haddock's own testimony in the subsequent action, involving property, brought in New York. This the Connecticut court should have found, if proper evidence had been before it. If no such evidence in the case itself was given, then the judgment based upon such evidence as there was is not open to collateral attack, and the remedies are such as are usual in cases of fraud practiced upon the court. But in no event could the Connecticut court's decision be treated as partially valid and partially void —as valid in some localities and null in others. But so long as this decision, coming from the highest court in the land, is not overruled by that court, it should be regarded as an exposition of the law on the subject, and divorces falling within its condemnation should not be granted. As a matter of fact, however, the decision is largely ignored in divorce cases in general in the country, thus bringing about a great deal of uncertainty with respect to the rights of the present as well as the future generation.

Incidentally the Haddock case very properly disposes of the point of federal divorce laws, above alluded to. The court says: "No one denies that the states, at the time of the adoption of the constitution, possessed full power over the subject of marriage and divorces. No one, moreover, can deny that, prior to the adoption of the constitution, the extent to which the states would recognize a divorce obtained in a foreign jurisdiction depended upon their conceptions of duty and comity. Besides, it must be conceded that the constitution delegated no authority to the government of the United States on the subject of marriage and divorce."

There has been too much of legislative

(5) Rogers v. Rogers, 56 Kansas, 483. Chapman v. Chapman, 48 Kansas, 636; Klien v. Klien, 57 Iowa, 386; Van Arsdale v. Van Arsdale, 67 Iowa 35.

interference with the personal rights of the people already to profit by any new and heretofore unheard of restrictions. The social conditions existing, which probably give rise to the agitation in question are due to many causes other than laxity or fault in the laws. Environment, commercial or business conditions, improper conceptions of marriage relations and home-life, occupations and work of the people, especially that of the women of our day, education, a more universal tolerance of the idea of divorce, and the like, than heretofore existed, and many other causes might be mentioned, but let these be discovered and discussed by sociologists, or others active in such fields. Let those who deplore social abuses and unsatisfactory conditions, preach and teach against them, But if the divorce laws are to be remodeled, let this be done with a full understanding of what the laws now really are and of the probable effect of proposed new laws upon the abuses aimed at, as well as of the danger of their detrimental effect upon the natural rights of mankind. Uniformity in statutes on this subject might be very desirable, but more important than this it is that default cases be given a stricter scrutiny under existing law by the judges, before granting decrees, and that some person have the duty to properly bring to the knowledge of the court the real facts, so far as ascertainable. The abuse of the divorce laws must not be attempted to be checked by taking away the rights of those who are in good faith seeking redress afforded by these laws. The scope of civil law is not to reform full-grown individuals, and make them more moral. Law is merely the rule of action for the people in the state, and actions are prosecuted for the recovery of rights and redress of grievances, never by way of lesson or example for the parties to it, or the people at large.

GEO. W. and M. C. FREERKS.

Wichita, Kansas.

FRAUDS, STATUTE OF—PAROL RESERVATION AFFECTING DEED.

GRABOW v. McCRACKEN.

Supreme Court of Oklahoma, May 12, 1909.

M. and another conveyed by warranty deed to G. a certain tract of land, for a consideration recited in the deed of $2,900, at said time there being standing upon said land a matured crop of corn; it being agreed by parol that the grantors should gather and remove from said premises said corn as a part of the consideration of said conveyance. The grantee afterwards claimed said crop of corn by virtue of said deed, there being no reservation of said crop in the face thereof. Held, that it might be shown by parol that said corn was reserved by the grantors as a part of the consideration for said conveyance.

On the 18th day of October, 1906, the plaintiff in error, as plaintiff, commenced his action in the probate court of Kingfisher county, territory of Oklahoma, against the defendants in error, William McCracken and Lucy McCracken, as defendants, by petition in replevin, alleging in due form that he was the owner and lawfully entitled to the immediate possession of certain personal property, to-wit, all the corn that was shucked and standing in a field upon a certain tract of land, all kaffir corn and hay on said land, and all kaffir corn in shocks standing on said land, etc. The evidence tended to show that on the 13th day of October, A. D. 1906, the defendants, by their warranty deed in regular form, conveyed in fee simple to the plaintiff the land upon which said corn and hay were then standing, same being matured and ready to be gathered and harvested; that then and there, as a part of the consideration of said conveyance, it was verbally understood that said corn and hay were reserved and should remain the property of the grantors, and not become the property of the grantee. Said cause was tried in the probate court of said county, and on November 1, A. D. 1906, was appealed to the district court, and on the 25th day of January, A. D. 1907, same was tried in the district court of said county without the intervention of a jury, and judgment rendered in favor of the defendants. Thereafter, in due time, a motion for a new trial was filed and overruled, and exceptions saved. By proceeding in error an appeal was prosecuted to the Supreme Court of the Territory of Oklahoma, and, by virtue of the provisions of the enabling act and the Schedule to the Constitution, same is now before this court for determination.

WILLIAMS, J. (after stating the facts as above): The sole question for determination is

whether or not, as a part of the consideration of the deed, it was permissible to reserve by parol the standing, ungathered, matured crop of corn and hay on said land.

In the case of Heavilon v. Heavilon, 29 Ind. 513, the court said: "It is well settled that a vendor, in a suit for the purchase money, may prove, by parol evidence, the amount thereof, the terms of payment and its non-payment, notwithstanding the receipt of the purchase money may be acknowledged in the deed. Now, suppose that the defendant, as a part of the consideration to the plaintiff for the land described in the deed, had agreed that the plaintiff should have a crop of wheat growing on another tract of land owned by the defendant, and had subsequently refused permission to cut and carry it away, would any one contend that the plaintiff could not recover of the defendant the value of the wheat? Or if, as in this case, the plaintiff had harvested the wheat without objection, that the defendant could recover back its value? Does not the same principle apply to this case? Can any logical reason be shown why it should not? Admit that the deed upon its delivery conveyed the growing wheat, and still it was not a fixture which constituted permanently a part of the land; it was the subject of sale by parol, and what rule of law is there to prohibit the defendant from making such sale a part of the same contract by which he would become the owner, or that would convert the deed into an estoppel against parol proof of such sale? If, as alleged in the reply, the defendant contracted the wheat to the plaintiff, as a part of the consideration of the land, then the execution of the deed was a part of the contract on the part of the plaintiff, and entitled him to the wheat, and no question under the statute of frauds, contended for by the appellee, could arise in the case."

See also Harvey v. Million, 67 Ind. 93.

In the case of Austin v. Sawyer, 9 Cow. (N. Y.) 39, the court said: "Whatever may be the rule of construction elsewhere, we are not at liberty here to question the validity of a parol contract for the sale of growing crops. Was there any evidence of such a contract? Rejecting all that passed anterior to and at the time of executing the written contract, the proof is that Wilcox, when treating with the defendant as to the sale of the farm, declared the wheat to belong to the plaintiff. This is sufficient, in my judgment, to authorize a jury to presume a formal and valid contract for the sale of the wheat."

In the case of Backenstoss v. Stahler's Adm'rs, 33 Pa. 251, 75 Am. Dec. 592, the court said: "It is a rule of common law that growing crops are personal property, but pass by conveyance as appurtenant to the land, unless severed by reservation or exception, and this rule has not been altered by statute of frauds and perjuries. A party may show by parol that the growing crops were reserved on a sale of the land, although there may be no exception in the deed."

See also Harbold v. Kuster, 44 Pa. 392.

In the case of Neill v. Chessen, 15 Ill. App. 266, it is held that parol evidence is admissible to show that the grantor should have the growing wheat, and the rent for a certain time, when the same is not reserved in the face of the deed.

In the case of Baker v. Jordan, 3 Ohio St. 438, it is held that growing corn may be reserved by parol from the operation of a deed, in common form, for the land whereon it grows; that growing corn may be a part of the realty for some purposes, but it is generally to be considered as personalty; that when the evidence of such understanding is produced it is not to contradict the deed, for with that it is perfectly consistent, but it is to show that what in some instances would go with the land as a part of the realty was, in that case, converted into personalty by the will of the parties, and thus to hold the deed to its true meaning and effect.

See, also, Phillips v. Keysaw, 7 Okl. 674, 56 Pac. 695; Aull Savings Bank v. Aull, 80 Mo. 199; Champion v. Mundy, 85 Ky. 31, 2 S. W. 546; Richardson v. Traver, 112 U. S. 423, 5 Sup. Ct. 201, 28 L. Ed. 804; McCrea v. Purmort, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; Hersey v. Verrill, 39 Me. 271; Quimby v. Stebbins, 55 N. H. 420; Steed v. Hinson, 76 Ala. 298; Fraley v. Bentley, 1 Dak. 25, 46 N. W. 506; Mobile, etc., R. Co. v. Wilkinson, 72 Ala. 286; McMahan v. Stewart, 23 Ind. 590; Frey v. Vanderhoof, 15 Wis. 397; Drury v. Tremont Implement Co., 13 Allen (Mass.), 168; McDill v. Gunn, 43 Ind. 315.

The following authorities support the contrary rule: Kammrath v. Kidd, 89 Minn. 380, 95 N. W. 213, 99 Am. St. Rep. 603; Gibbons v. Dillingham, 10 Ark. 9, 50 Am. Dec. 233; Winn v. Murehead, 52 Iowa, 64, 2 N. W. 949; Stewart v. McArthur, 77 Iowa, 162, 41 N. W. 604; Adams v. Watkins, 103 Mich. 431, 61 N. W. 774; Taylor v. Southerland et al., 7 Ind. T. 666, 104 S. W. 874; Chapman v. Veach, 32 Kan. 167, 4 Pac. 100.

The weight of authority and reason supports the rule, at least, that a matured crop of corn and wheat standing ungathered upon a tract of land may be specifically reserved by parol in the sale of the land, as a part of the contract price or consideration of the deed.

The judgment of the lower court is affirmed. All the Justices concur.

NOTE.—*Growing Crops as Part of Land Conveyed—Conflict of Decision as to Parol Reservation.*—The court rendering the decision in the principal case handed down on the same day it was decided, another decision, in which it was held that a successful plaintiff in ejectment is entitled to matured crops standing unsevered on the land, reasoning in the opinion to the conclusion that "as between the grantor and the grantee, and as between mortgagor and the purchaser at a foreclosure sale, they are a part of the realty, and pass with the realty upon which they stand, to the grantee or purchaser, unless reserved," notwithstanding that they are subject to levy and sale as chattels for the debts of the owner. See Hartshorne v. Ingels, 101 Pac. 1045. The principal case, therefore, is to be read in the light of the view taken by that court as to unsevered crops being part of the realty, as to which there is some conflict of authority, as shown in the Hartshorne case.

The cases opposed to the ruling in the principal case go upon the theory, that in deeds "the true consideration may generally be shown, but when evidence offered for such purpose will have the effect to restrain the legal operation of the covenants, it is incompetent. Kammrath v. Kidd, supra. Thus see also Brown v. Thurston, 56 Me. 126, 96 Am. Dec. 438, where evidence was offered and received by the trial court of a verbal reservation of potatoes growing upon the land. The supreme court said: "This evidence was inadmissible. A parol reservation of fixtures or growing crops, before or at the time of the delivery of the deed, is not admissible in evidence to alter or control the effect of the deed. If the agreement was before the execution and delivery of the deed, it is merged in the final determination of the parties as evidenced by the deed. If it was made at the time of the delivery, it must be regarded as an exception or reservation, and, being repugnant to the terms and effect of the deed, is void." In support of this holding, the court cites Noble v. Bosworth, 19 Pick. 314, which case referred to a fixture, but it proceeded on the principle that as it was contrary to the general rule of the common law to allow parol evidence to affect rights and interests in real estate, so "it is as much against these rules to admit parol evidence to prevent or restrain the legal inferences and consequences of a deed as to control and alter its express provisions." In Flynt v. Conrad, 61 N. C. 190, 93 Am. Dec. 588, the court, going upon the theory that *fructus industriales* are in various ways and aspects regarded as personal chattels, thought, that, at most, there is a presumption that they pass where there is no express reservation to the contrary, and this presumption is very slight and rebuttable. In this case a distinction was drawn between *fructus industriales* and fruit on trees, parol evidence being admitted in respect to the former but not as to the latter. The court thus said: "In respect to fruit on trees, and 'not fallen,' there is a diversity, for trees are a substantial and permanent part of the land, and a deed passing the land actually passes the trees and does not simply raise a presumption, that it was the intention to pass them; hence, if there be a parol agreement to convey land, and to except fruit on trees, and a deed is executed which does not except the fruit, that part of the agreement is defeated, for the statute of frauds requires it to be in writing."

In Powell v. Rich, 41 Ill. 466, it was held that immature crops are part of the realty and it was said that, in that state, parol evidence was not admissible to show a reservation. In Firebaugh v. Divan, 207 Ill. 287, what was said in the Powell case about matured crops was declared *obiter*, and it was ruled generally that as between vendor and vendee, "crops not severed from the soil, whether ripe or unripe, pass to the vendee as a part of the land." And "by the delivery of the deed, the vendor loses all dominion over the land." This statement carries the inference that Neill v. Chessen, supra, would be overruled by the supreme court. In 8 Am. & E. Encyc., p. 306, it is said: "Since under a conveyance of land growing crops pass to the vendee, unless specially reserved, the familiar rule of evidence, which excludes proof of parol agreement impairing the legal effect of a written agreement, forbids the establishment of such a reservation by parol, to which are cited a number of cases other than those mentioned in the opinion in the principal case. Thus Fiske v. Soule, 87 Cal. 313; Damery v. Ferguson, 48 Ill. App. 225; McIlvaine v. Harris, 20 Mo. 457, 64 Am. Dec. 196 and others. The McIlvaine case held squarely that way and it has been cited frequently to the proposition that by the common law growing crops are a part of the freehold and pass by the deed to the land. See Reed v. Swan, 133 Mo. l. c. 106. The case of Aull Savings Bank v. Aull, cited by the principal case, in no way referred to such a question as this, but the ruling there was that an agreement that grantor might continue to occupy a desk on the premises could be shown by parol in bar of an action for use and occupation, as this affected only the consideration clause.

8 Am. & E. Encyc. at page 307, states that the doctrine supported by the principal case obtains only in Indiana, Ohio, Pennsylvania, North Carolina and New Jersey, and, therefore, it is greatly to be doubted whether the weight of authority is on the side the principal case asserts. As to reason supporting that rule, that also we greatly doubt, and think an exception in favor of crops ought to be allowed less now than in elder days, when registration laws were not perfected as now and when lands—especially those growing crops—were far less likely than now to pass rapidly to successive vendees. Reservations could be so easily incorporated in deeds that it would appear to be a sort of negligence to omit doing so. C.

JETSAM AND FLOTSAM.

PROSECUTING USURY IN THE KEEPING OF A DISORDERLY HOUSE.

An interesting case on the subject of usury was decided in the court of errors and appeals in the case of State v. Martin. The defendant was formerly manager of the Loan Company of Trenton, prominently located at 18 East State street. He was convicted in the Mercer County Court of keeping a disorderly house, and was fined $1,000 by Judge Rellstab. The case was appealed to the supreme cuort, and then to the court of errors. In both the lower courts it was argued that the habitual taking of usurious interests for loans could not make a place a dis-

orderly house, but the Court of Errors held, following the views of both lower courts, that "it must be accepted that any place in which illegal practices are habitually carried on is a disorderly house." In reply to the next contention of counsel that the act against usury does not impose any penalty for the crime, the Court of Errors says: "The statement that the statute does not impose any penalty upon a person who takes usury is not accurate; for the second section of the act deprives him of the power to enforce the payment of any interest on his loan, and entitles the borrower to have the amount of the usury deducted from the principal of the loan in case usury has been paid. Nor do we think the suggestion sound," continues the court, "that the taking of usury is not lawful because the statute does not prohibit the borrower from paying it. If it is, then the sale of liquor without a license is not unlawful, although prohibited by statute, for there is nothing in the statute which imposes any penalty on a person who purchases liquor from an unlicensed vendor, or which forbids any one from so purchasing. The gaming act, also, although it prohibits gambling, imposes no penalty on the loser. We conclude, therefore, that a person who maintains a place of business in which the law against usury is habitually violated is guilty of the offense charged in the indictment now before us."—New Jersey Law Journal.

PITHY EXPRESSIONS BY SIR EDWARD COKE

Sir Edward Coke, Lord Chief Justice of England in the time of Queen Elizabeth, was a lawyer of prodigious learning and an upright judge. His writings have in them pith, humor, and quaintness. From a recent excellent article upon his writings in the Yale Law Journal for May, we find a number of those brief sentences of his which well show the quality of his mind, many of which are often quoted when the one who quotes them does not know their origin. We reproduce a few of these below:

"The general custom of the realm is the common law."

"Questions (are) like spirits which may be raised with much ease but vanquished with much difficulty."

"Perpetuities were born under some unfortunate constellation."

"All the sons of Adam must die."

"Idleness is the mother of all vice and wickedness."

"One ought not to have so delicate a nose that he cannot bear the smell of a hog."

"The common law is an old, true and faithful servant to this commonwealth."

"I am not afraid of gnats that can prick and cannot hurt, nor of drones that keep a-buzzing and would, but cannot sting."

Of certain books he said: "They are like to apothecaries' boxes whose title promise remedies, but the boxes themselves contain poison."

"To proceed farther were but to gild gold or to add a little drop to the great ocean."

A certain statute he says: "Is cousin German to another."

"It is the worst oppression that is done by color of justice."

"No man shall be examined upon secret thoughts of his heart or of his secret opinions. Thought is free."

"The Judges cannot create offenses nor do as Hanibal did to make his way over the Alps when he could find none."

"Ambition rideth without reins."

"Preventing justice is better than punishing justice."

"Truth is the mother of justice."

"A law worthy to be written in letters of gold, but more worthy to be put in due execution."

"It is good chance to obtaine, but great wisdome to keep."

"They that buy will sell."

"The house of every man is his castle and fortress."

"No man ought to be condemned without answer."

"Peace is the mother of plenty, and plenty the nurse of suits."

"Execution is the life of the law."

"The agreement of the parties cannot make that good which the law maketh void."

"Justice is the daughter of the law, for the law bringeth her forth."

"A right cannot die: trodden down it may be, but never trodden out."

"Nothing that is contrary to reason is consonant to law."

"Corporations have no souls."

HUMOR OF THE LAW.

The Lawyer (cross examining)—"Now, what did you say your first name was?"

The Witness (cautiously)—"Waal, I was baptized John Henry."

The Lawyer—"You were were, you? How do you know you were?"

The Witness—"Waal, I was there, you know."

The Lawyer—"Huh! How do you know you were?"

The Witness—"Why, I couldn't have been baptized otherwise. And, besides, I think I can remember it quite well."

The Lawyer—"Ho, you do, do you?"

The Witness—"Waal—er—yes."

The Lawyer (deeply sarcastic)—"Kindly explain to the court and jury, my friend with the phenomenal memory, how an infant in arms came to remember that ceremony so well, will you?"

The Witness—"Waal—er—you see, I wasn't baptized until I was eighteen years old."

"Your act," stated the lawyer, "is declared to be deliberate, intentional, willful, obstinate, evil, anarchistic, wanton, malicious, autocratic and menacing."

"Golly," faltered the teamster who had blocked traffic for a few moments, "better lemme go to jail, boss. You can't clear me of all that."

Not long ago a friend was telling Gordon Mendelssohn, the young actor who has joined the Martin and Emery players, of the decease of one of his distant relatives.

"Do you know?" remarked this friend, with a rising inflection, "my grand uncle was reputed to be very rich, but when he died the only thing left was a Dutch clock?"

"Well, there's one good thing about it," remarked Mr. Mendelssohn, after a moment's thought, "it won't be much trouble to wind up the estate."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort and of all the Federal Courts.

1. **Accident Insurance**—Construction.—Under an accident policy, covering the drivers of defendant transfer company, plaintiff held entitled to premiums based on the entire compensation paid the drivers, though part of the time they acted as stablemen.—Palmer Transfer Co. v. Fidelity & Casualty Co., Ky., 118 S. W. 370.

2. **Action**—Misjoinder.—Where matters charged against each of two defendants were separate and independent, the petition was demurrable for misjoinder of causes.—Battle v. Atlantic Coast Line R. Co., Ga., 64 S. E. 463.

3. **Adverse Possession**—Defense.—Defense of adverse possession held defeated by the execution of a writ of possession against defendants within the statutory period.—Riley v. Roach, Ky., 118 S. W. 321.

4. **Appeal and Error**—Photographs.—Photographs filed as exhibits should be filed with the transcript in the circuit court and certified by the circuit court clerk with the transcript.—Southern Ry. Co. in Kentucky v. Schmidt, Ky., 118 S. W. 324.

5. **Assignments**—Building Contractor. — A building contractor has the common-law right to assign the balance due and to become due from the owner to secure advances made and to be made, and the assignment will be enforced according to the common-law principles governing assignments.—A. & S. Spengler v. Stiles-Tull Lumber Co., Miss., 48 So. 966.

6. **Attachment**—Advice of Counsel.—One sued for wrongful attachment held not relieved from liability for exemplary damages because he acted on advice of counsel.—Rainey v. Kemp, Tex., 118 S. W. 630.

7.——Affidavit for.—An affidavit for attachment should not be quashed for uncertainty in the amount sued for, where the original petition alleges reasonable value and certain plans, and the affidavit to the petition states a specific sum.—Hall v. Parry, Tex., 118 S. W. 561.

8. **Bankruptcy**—After Acquired Property.—The life estate of a bankrupt acquired by will after the adjudication of his bankruptcy does not pass to his trustee.—Hackett's Ex'rs v. Hackett's Trustee, Ky., 118 S. W. 377.

9. **Banks and Banking**—Comptroller.—A decision of the Comptroller of the Currency that a national bank's stock is impaired is conclusive on the courts and on the bank's stockholders.—Thomas v. Gilbert, Or., 101 Pac. 393.

10.——Deposit Slip.—A deposit slip is a mere acknowledgment by the bank of the receipt of the money, and does not embody the contract between the parties.—Fort v. First Nat. Bank, S. C., 64 S. E. 405.

11. **Benefit Societies**—Dues and Assessments.—A by-law of an insurance order providing for a forfeiture of the benefit certificate held by the member as a penalty for his failure to pay dues and assessments provided by his contract is reasonable, and will be enforced by the courts.—Burke v. Grand Lodge, A. O. U. W., of Missouri, Mo., 118 S. W. 493.

12.——Estoppel.—Plaintiff's reply denying that any portion of the premium was due at the date of the fire, and alleging affirmatively an agreement to pay the premium in monthly installments, held not to deprive plaintiff of the right to introduce evidence of an estoppel.—Olympia Brewing Co. v. Pioneer Mut. Ins. Ass'n., Wash., 101 Pac. 371.

13. **Bills and Notes**—Agency.—Where an agent authorized to sell and collect takes a note payable to himself and indorses it over to his principal, the principal takes it subject to conditions affecting its execution.—Buckeye Saw Mfg. Co. v. Rutherford, W. Va., 64 S. E. 444.

14.——Estoppel.—A maker of a note held estopped as against an innocent purchaser thereof from urging that the note had never been delivered to the payee.—Goodwin & McFarland v. Burton, Tex., 118 S. W. 587.

15.——Evidence.—In an action on negotiable paper by the transferee, the fact that plaintiff and his transferror were located in the same city in another state may be considered as tending to show that plaintiff had an opportunity to obtain knowledge of the facts on which the defense is based.—Johnson County Savings Bank v. Walker, Conn., 72 Atl. 579.

16.——Burden of Proof.—The maker of a note has the burden of showing want of consideration.—Wehner v. Bauer, Cal., 101 Pac. 417.

17. **Bills of Lading**—Title.—The general rule held to be that transfer by the consignee of a bill of lading, without indorsement, gives title.—McMeekin v. Southern Ry. Co., S. C., 64 S. E. 413.

18. **Boundaries**—Land Bordering on Ocean.—The line to which the flow of the water reaches at ordinary or neap tide, unaffected by wind or wave, constitutes the boundary line of land bordering on the ocean.—Eichelberger *v.* Mills Land & Water Co., Cal., 100 Pac. 117.

19. **Brokers**—Withdrawal.—An owner employing a broker to effect an exchange of lands held authorized to withdraw his proposition before its acceptance and defeat the right of the broker to commissions.—Arthur v. Porter, Tex., 118 S. W. 61.

20. **Building and Loan Associations**—Interest

and Premiums.—That a building association does not advance to a borrowing member the whole amount of the loan as agreed for held not to excuse the payment of interest and premiums on the whole loan, nor does the fact that the association did not set apart the amount of the loan as a special fund.—Tibbets v. Deering Loan & Building Ass'n, Me., 72 Atl. 162.

21. **Cancellation of Instruments**—Injunction Bond.—In an action to cancel an injunction bond given by plaintiff, plaintiff held to have the burden under the pleadings of showing that defendants were not damaged by the injunction.—Lawler v. Merritt, Conn., 72 Atl. 143.

22. **Carriers**—Change of Cars.—Where a woman passenger, as a result of the carrier's failure to notify her where to change cars, was defleeced in her journey and compelled to bear added travel and sojourn in hotels, resulting in annoyance, illness, anxiety and some expense, a recovery of $500 was not excessive.—Central of Georgia Ry. Co. v. Ashley, Ala., 48 So. 981.

23.——Due Care.—One riding on a crowded street car assumes the resulting inconvenience, but the carrier is not relieved from the duty to use due care for his safety.—Lobner v. Metropolitan St. Ry. Co., Kan., 101 Pac. 463.

24.——Exemption from Negligence.—A carrier cannot contract for exemption from liability for its own negligence or the negligence of its servants, though not inhibited from making such exemption by statute.—St. Louis Southwestern Ry. Co. v. Wallace, Ark., 118 S. W. 412.

25.——Telephone Companies.—A telephone is a facility and convenience within Const. art 9, sec. 18 (Bunn's Ed., sec. 222; Snyders Ed., p. 238), empowering the Corporation Commission to require carriers to maintain such public service facilities and conveniences as may be reasonable.—Atchison, T. & S. F. Ry. Co. v. State, Ok., 100 Pac. 11.

26. **Charities**—Application of Cy Pres Doctrine.—The doctrine of cy pres cannot be applied where donor himself provides for the application of the fund on failure of the charitable use to which in the first instance he directs it to be devoted.—Larkin v. Wikoff, N. J., 72 Atl. 98.

27.——Cy Pres Doctrine.—When a charity cannot be enforced in the precise mode prescribed by the donor, equity will give effect to his general purpose by adopting a method which seems to be as near his intention as existing conditions permit under the doctrine of cy pres.—City of Keene v. Eastman, N. H., 72 Atl. 213.

28. **Chattel Mortgages**—Seizure.—Authority in a chattel mortgage to seize the property on default in payment held an irrevocable license, giving right to take the property from the mortgagor's premises, so long as there is no breach of the peace.—Willis v. Whittle, S. C., 64 S. E. 410.

29. **Common Law**—Cessat Ratio.—Where the reason of a rule of law does not exist, the rule itself should not be followed.—In re Hite's Estate, Cal., 101 Pac. 443.

30. **Compromise and Settlement**—Conclusiveness.—Where there has been a valid agreement to compromise, it is not admissible to go back of the settlement to determine who was right in the original contention.—Kiler v. Wohletz, Kan., 101 Pac. 474.

31. **Constitutional Law**—Conflicting Amendments.—Where a section of the Constitution is amended at the same time by different amendments and they are directly in conflict and cannot be reconciled, they must both fall.—McBee v. Brady, Idaho, 100 Pac. 97.

32. **Contracts**—Construction.—The contemporaneous construction placed on an instrument by the parties thereto is entitled to much weight in reaching the intent and purpose of the instrument.—A. & S. Spengler v. Stiles-Tull Lumber Co., Miss., 48 So. 966.

33.——Burden of Proof.—The burden is on the party asserting the modification of a contract to show the assent of the other party thereto.—A. G. Brown & Co. v. McKnight, Ark., 118 S. W. 409.

34.——Estoppel.—Where parties to a contract accept the benefit of another party's services under the contract, and pay him a portion of the consideration, they cannot withhold the remainder of the consideration, unless the contract gives them the right to do so.—Mitchell v. Rushing, Tex., 118 S. W. 582.

35. **Corporations**—Consolidation.—A corporation composed of other corporations resident in different states, the consolidation having been effected by the laws of each of the states, is a corporation of each state authorizing the consolidation.—Mackay v. New York, N. H. & H. R. Co., Conn., 72 Atl. 583.

36.——Insolvency.—Insolvency alone is not sufficient to authorize the appointment of a receiver of a corporation at the instance of a stockholder, but the remedy is liquidation of the corporate affairs by commissioners.—Hero v. Consumers' Lumber Mfg. & Export Co., La., 48 So. 989.

37.——Limitations.—Under a statute providing that an action against stockholders must be brought within 18 months after the debt or obligation of the corporation becomes enforceable against the stockholders, limitations run in favor of the stockholders when the corporate property of the corporation has been placed in the hands of a receiver.—McNutt v. Bakewell, Pa., 72 Atl. 639.

38.——Personal Contract.—A contract by which defendant agreed to repurchase stock subscribed for by plaintiff in a corporation signed, "W. H. Plummer, Treas.," held to bind defendant personally.—Gavazza v. Plummer, Wash., 101 Pac. 370.

39.——Similarity of Names.—A corporation, chartered under the name of "Benevolent and Protective Order of Elks of the United States of America," held entitled to an injunction restraining a similar organization, composed of colored people, from using the name "Improved Benevolent and Protective Order of Elks of the World."—Benevolent and Protective Order of Elks v. Improved Benevolent and Protective Order of Elks, Tenn., 118 S. W. 389.

40.——Suit by Stockholder.—Minority stockholders of a corporation may maintain suits to declare corporate action ultra vires and void after having first demanded action by the corporation and been refused.—Knapp v. Supreme Commandery, United Order of the Golden Cross of the World, Tenn., 118 S. W. 390.

41.——Unpaid Subscription.—The amounts due from the stockholders for stock subscribed are a trust fund for the creditors of the corporation, and, if unpaid, are a part of the assets and may be collected for the creditors.—Burke v. Maze, Cal., 101 Pac. 438.

42. **Courts**—Jurisdiction.—The jurisdiction of court is not sustained by the mere sworn statement of a litigant as to the amount involved

where the circumstances of the case contradict him.—Nick v. Bensberg, La., 48 So. 986.

43. **Criminal Law**—Evidence.—All of the transaction in which the offense was committed may be given in evidence, though it shows another crime.—Bennett v. Commonwealth, Ky., 118 S. W. 332.

44.——Experts.—It is competent to prove intoxicating qualities of substitutes for liquor by experimental effect or opinions of experts.—Markinson v. State, Ok., 101 Pac. 353.

45. **Customs and Usages**—Presumptions.—If both parties to a contract are engaged in the same trade, they will be presumed to have knowledge of a trade custom as to the terms of delivery, though they have no actual knowledge thereof, and it is not essential that the custom be general or universal.—J. E. Smith & Co. v. Russell Lumber Co., Conn., 72 Atl. 577.

46. **Damages**—Measure.—In an action for injuries, damages are confined to expense of cure, value of time lost, compensation for suffering and permanent reduction of earning power.—Louisville & N. R. Co. v. Crow, Ky., 118 S. W. 365.

47.——Mental Suffering.—Mental anguish caused an injured person by his being an object of pity, sympathy, or curiosity to the public or to his friends held not a subject of compensation.—Gulf, C. & S. F. Ry. Co. v. Dickens, Tex., 118 S. W. 612.

48. **Dedication**—Acceptance.—Mere dedication is not enough to constitute a street a public street, so as to impose on a city the duty to keep it clear of defects, nuisances, and obstructions by third persons or by the city itself, but there must be an acceptance of the dedication by the city.—Benton v. City of St. Louis, Mo., 118 S. W. 418.

49. **Deeds**—Granting Clause.—Where, in the caption of a deed, T. and his wife were named as parties of the second part, but in the granting clause only T. was named, there was a conveyance to T. alone.—Loughridge v. Ball, Ky., 118 S. W. 321.

50. **Easements**—Construction.—An ambiguous grant of an easement will be construed in favor of the claimant of the easement.—Frisbie v. Bigham Masonic Lodge, No. 256, Ky., 118 S. W. 359.

51. **Electricity**—Res Ipsa Loquitur.—Doctrine of res ipsa loquitur held not applicable to electric light company furnishing electricity to the owner of a building, the wiring in which was his property and subject to his control.—Minneapolis General Electric Co. v. Cronon, U. S. C. C. of App., Eighth Circuit, 166 Fed. 651.

52. **Eminent Domain**—Damages.—In condemning waterworks on the petition of a city, the company is entitled to compensation for the property taken and for the franchise.—In re Monongahela Water Co., Pa., 72 Atl. 625.

53. **Escrows**—Delivery.—A buyer and a third person indorsing a note for the price held liable thereon, though the bill of sale delivered in escrow had not been actually delivered to the buyer.—Ketterson v. Inscho, Tex., 118 S. W. 626.

54. **Estoppel**—Creditors.—The owner of a stock of goods intrusting it to a firm, and allowing it to deal with the goods as its own, held estopped as to creditors of the firm from claiming the goods.—Holder v. Shelby, Tex., 118 S. W. 590.

55. **Evidence**—Deed.—Evidence of statements of an alleged grantor held inadmissible to impeach a deed.—Hughes Bros. v. Redus, Ark., 118 S. W. 414.

56.——Exemplary Damages.—In trover for cattle, in which plaintiff claimed exemplary damages, testimony by plaintiff as to a difficulty which occurred at the time the cattle were taken was admissible as part of the res gestae.—Boardman v. Woodward, Tex., 118 S. W. 550.

57.——Judicial Notice.—Courts will take judicial notice of the accuracy of X-ray photographic views of the bones of a living body, when properly taken.—Houston & T. C. R. Co. v. Shapard, Tex., 118 S. W. 596.

58 **Executors and Administrators**—Foreign Administrator.—Where a court of a sister state had the power, on the discharge of a public administrator, to substitute another as public administrator, an order of substitution was conclusive on the courts of Arkansas in an action by the substituted administrator.—McCarthy v. Troll, Ark., 118 S. W. 416.

59.——Non-residence.—Where there was property of a non-resident decedent in the county at the time letters were granted, it was immaterial that there was none there when decedent died.—Neal v. Boykin, Ga., 64 S. E. 480.

60. **Exemptions**—Automobile.—An automobile held not exempt from levy and attachment as a tool or implement of trade.—Eastern Mfg. Co. v. Thomas, S. C., 64 S. E. 401.

61.——Residence.—Where the debtor and creditor are residents of the same state, an attempt by the creditor to evade the exemption law of the state by bringing suit in a sister state may be enjoined by a chancery court.—Greer v. Strozier, Ark., 118 S. W. 400.

62. **Frauds, Statute Of**—Memorandum.—Terms of a contract, so far as they constitute part of the consideration, need not be stated in the memorandum to satisfy the statute of frauds.—Campbell v. Preece, Ky., 118 S. W. 373.

63. **Homestead**—Remainder.—The conveyance by a widow of her homestead to the remainderman held to merge the entire fee in the remainderman.—Hardy v. Atkinson, Mo., 118 S. W. 516.

64. **Injunction**—Dissolution.—On motion to dissolve a temporary injunction, the bill must be taken as true, in the absence of a sworn answer traversing the equity of the bill.—Dawson v. Baldridge, Tex., 118 S. W. 593.

65.——Jurisdiction.—Equity has no jurisdiction of a bill to restrain prosecution of action before a justice having no jurisdiction thereof.—Michael v. Elkins, W. Va., 64 S. E. 440.

66.——Practice.—An injunction against maintaining an action cannot be made to serve the purpose of an appeal.—Turner v. Patterson, Tex., 118 S. W. 565.

67.——Suit on Bond.—Plaintiff in an action on an injunction bond is limited to the damages alleged.—Green v. Quisenberry, Ky., 118 S. W. 361.

68. **Judgment**—Foreign Judgment.—To maintain an action on a foreign judgment against a plea of nul tiel record, a certified copy of the judgment, together with the pleadings and proceedings in which the judgment was founded, held necessary.—McCarthy v. Troll, Ark., 118 S. W. 416.

69.——Opening Default.—Failure of a wife to examine process served on her and her husband held excusable neglect, entitling defend-

ant to open a default judgment.—Turner v. Bolton, S. C., 64 S. E. 412.

70. **Landlord and Tenant**—Defense.—In an action by the landlord for rent of new building, tenant held not entitled to allege that the building was not constructed according to plans, so as to defeat the action.—White v. Connelly, Pa., 72 Atl. 637.

71. **Libel and Slander**—Privilege.—Publication of false and libelous matter by signing an affidavit to be used on the hearing in equity held privileged.—Bibb v. Crawford, Ga., 64 S. E. 488.

72. **Limitation of Actions**—Temporary Absence.—Where debtor has moved from the state, limitations run during a temporary return for all the time spent in the state, unless he conceals himself.—Baxter v. Krause, Kan., 101 Pac. 467.

73. **Malicious Prosecution**—Malice Inferred.—Malice in the prosecution of a defamatory suit may be inferred from the existence of want of probable cause.—Bosch v. Miller, Mo., 118 S. W. 506.

74. **Mandamus**—Scope of Relief.—In granting a writ of mandamus to compel the levy of a tax by a municipal corporation to pay a judgment, the court may, in the exercise of broad equity powers, direct the distribution of the tax over a number of years, where it would otherwise impose a hardship on taxpayers.—City of Cleveland, Tenn., v. United States, U. S. C. C. of App., Sixth Circuit, 166 Fed. 677.

75. **Master and Servant**—Assumption of Risk.—The rule of assumption of risk held to apply with much greater force to an employee who voluntarily exposes himself to danger.—State v. Baltimore Mfg. Co., Md., 72 Atl. 602.

76.——Assurance of Safety.—Where a servant, who was firing a defective boiler, called the foreman's attention to escaping steam and was assured that there was no danger, he had a right to rely upon the assurance.—Keen's Adm'r v. Keystone Crescent Lumber Co., Ky., 118 S. W. 355.

77.——Constitutional Law.—The redemption by the employer at bi-monthly pay days of checks issued to employees for services at a reduction of 10 per cent. of their face value is a violation of Const. Sec. 244.—Kentucky Coal Mining Co. v. Mattingly, Ky., 118 S. W. 350.

78.——Control.—Where a master gives the labor of his servant to a third person without losing the control of him, the servant does not become a servant of the third person.—Walker v. El Paso Electric Ry. Co., Tex., 118 S. W. 554.

79.——Independent Contractor.—One who employs an independent contractor held not liable for an injury caused by the negligence of the contractor.—Lampton v. Cedartown Co., Ga., 64 S. E. 495.

80.——Latest Defects.—Master furnishing machine in good order and without latent defects discharges his full duty.—Podvin v. Pepperell Mfg. Co., Me., 72 Atl. 618.

81.——Ordinary Care.—A master is not an insurer of the servant, nor is he required to exercise more than ordinary care to guard the servant against risk of injury.—Reickert v. Hammond Packing Co., Mo., 118 S. W. 525.

82. **Mines and Minerals**—Conveyance.—Interest in an instrument granting right to mine and remove coal, creating an estate for more than five years, can only be assigned by deed or will.—Comley v. Ford, W. Va., 64 S. E. 447.

83. **Mechanics' Liens**—Notice.—An assignment by a contractor of the balance due and to become due from the owner held good as against subcontractors, materialmen, and laborers subsequently serving notice of lien on the owner.—A. & S. Spengler v. Stilles-Tull Lumber Co., Miss., 48 So. 966.

84. **Mortgages**—Ejectment.—Possession under a mortgage conveys no title, and is no defense in ejectment by the holder of the title.—Phillips v. Bond, Ga., 64 S. E. 456.

85.——Parol Evidence.—A deed absolute may be shown by parol to have been intended as a mortgage, where grantee has not taken possession.—Spencer v. Schuman, Ga., 64 S. E. 466.

86.——Res Judicata.—A mortgage foreclosure judgment establishes conclusively both the debt and the lien.—Blair v. Guaranty Savings, Loan & Investment Co., Tex., 118 S. W. 608.

87. **Municipal Corporations**—Damages.—In an action against a city for flooding a lot by raising the grade of streets, the city could not offset, against any liability for negligence in that respect, the increase in the market value of the property, due to the general advance in real estate values in the city.—Mayrant v. City of Columbia, S. C., 64 S. E. 416.

88.——Excavations in Street.—In an action against a city to recover for the death of a person caused by the falling of an automobile in which he was riding into an excavation in a street made by defendant, the question whether it exercised proper care in guarding or marking the excavation held one for the jury.—City of Baltimore v. State of Maryland, U. S. C. C. of App., Fourth Circuit, 166 Fed. 641.

89.——Indemnity.—While a city ordering a street improvement cannot avoid liability as to individuals with respect to the primary duties imposed on it by law, it may by contract require the contractor to indemnify it.—Morris v. Salt Lake City, Utah, 101 Pac. 373.

90.——Revocable License.—One maintaining under a revocable license pipes in the streets of a city to deliver water to customers cannot recover damages from the city for not allowing him to carry on the business.—Kevil v. City of Princeton, Ky., 118 S. W. 363.

91. **Negligence**—Contributory Negligence.—Contributory negligence is not involved in a case when not pleaded.—Sutton v. Southern Ry. Co., S. C., 64 S. E. 401.

92.——Liability of Manufacturer or Vendor.—A manufacturer and licensor of shoe machinery held to owe no duty to a servant of the licensee which would render the licensor liable for injuries to the operator caused by defects in the machine.—McClaren v. United Shoe Machinery Co., U. S. C. C. of App., First Circuit, 166 Fed. 712.

93.——Presumption.—One held entitled to assume that another who is aware of impending danger will use reasonable efforts to save himself.—Riley v. Consolidated Ry. Co., Conn., 72 Atl. 562.

94.——Proximate Cause.—If two distinct causes are successive and unrelated, the law regards the proximate cause as the efficient and consequent cause and disregards the remote.—St. Louis & S. F. R. Co. v. Justice, Kan., 101 Pac. 469.

95. **New Trial**—Prejudice of Juror.—Where a juror had stated before trial that plaintiff

ought to recover the full amount of his demand, but stated on his voir dire that he had formed or expressed no opinion on the merits, held reversible error to deny defendant's motion for a new trial.—Gulf, C. & S. F. Ry. Co. v. Dickens, Tex., 118 S. W. 612.

96. **Partnership**—Holding Out.—Matters leading one to believe that a partnership existed must have occurred before such belief was formed and acted upon, in order to create a partnership liability by estoppel.—Bowen v. Epperson, Mo., 118 S. W. 528.

97.——Liability.—Where both partners are liable on a contract, the dissolution of the firm will not terminate the contract.—Peck-Williamson Heating & Ventilating Co. v. Miller & Harris, Ky., 118 S. W. 376.

98. **Physicians and Surgeons**—Malpractice.—Plaintiff, in an action for malpractice, held entitled to recover on proving one of the acts of negligence alleged, though failing to prove another act of negligence alleged.—Samuels v. Willis, Ky., 118 S. W. 339.

99. **Pleading**—Error Cured.—In an action for injuries by being thrown from a street car which started while plaintiff was getting aboard, if the complaint did not sufficiently show that the car was stopped by defendant's servants in response to plaintiff's signal, the omission held to have been supplied by the answer.—Nilson v. Oakland Traction Co., Cal., 101 Pac. 413.

100.——Motion.—A defect in a pleading arising from its failure to contain a sufficiently definite statement of the cause of action relied on can only be reached by a motion to make more definite and certain, and not by demurrer.—Greer v. Strozier, Ark., 118 S. W. 400.

101. **Pledges**—Purchase by Pledgee.—The purchase of pledged property by the pledgee at his own sale is voidable.—Thomas v. Gilbert, Ore., 101 Pac. 393.

102. **Process**—Service.—Personal service having been obtained on a resident beneficiary association in a suit to restrain a merger with a foreign association, and the resident society's assets being impounded by injunction, the court acquired jurisdiction, though the non-resident society was served by publication only.—Knapp v. Supreme Commandery, United Order of the Golden Cross of the World, Tenn., 118 S. W. 390.

103. **Quo Warranto**—Burden of Proof.—In quo warranto to determine defendant's title to a public office, defendant must show a complete title to the office or judgment of ouster must be rendered against him.—State v. Hatch, Conn., 72 Atl. 575.

104. **Railroads**—Crossing.—A traveler approaching a public crossing held entitled to presume, in the absence of signals, that he may proceed in safety.—Dunwoody v. Missouri, K. & T. Ry. Co., Mo., 118 S. W. 503.

105.——Regulations.—A railroad company may adopt a rule that a certain train shall not stop at designated stations, and a passenger is bound to inquire whether the train on which he takes passage stops at his destination.—Black v. Atlantic Coast Line R. Co., S. C., 64 S. E. 418.

106.——Warning.—The rule requiring a railroad company to give warning and keep a lookout for persons on the track where it is used commonly by the public held confined to cities, and thickly populated communities.—Miller's Adm'r v. Illinois Cent. R. Co., Ky., 118 S. W 348.

107. **Sales**—Cancellation.—A purchaser of goods reserving right to cancel order, where time is not fixed, must do so within a reasonable time.—J. P. Bauman & Sons v. McManus Bros., Kan., 101 Pac. 478.

108.——Delivery.—That a delivery of goods to a carrier may constitute delivery to the consignee so as to pass title, the goods must correspond with the consignee's order.—Bray Clothing Co. v. McKinney, Ark., 118 S. W. 406.

109. **Sheriffs and Constables**—Trespass.—An officer, executing replevin writ on property on which plaintiff had a chattel mortgage, held not liable in trespass to plaintiff.—Muskin v. Moulton, Me., 72 Atl. 617.

110. **Specific Performance**—Marketable Title.—A bare contract to purchase will not be specifically enforced, unless the vendor has a marketable title.—Shea & McGuire v. Evans, Md., 72 Atl. 600.

111.——Notice.—Purchaser of property with notice that the grantor had conveyed to another may be compelled to perform the grantor's contract.—Drake v. Brady, Fla., 48 So. 978.

112.——Parol Contract.—Part performance of a parol contract to convey real estate must be unequivocal and referable alone to the contract to warrant specific performance.—Collins v. Harrell, Mo., 118 S. W. 432.

113. **Statutes**—Construction.—In construing a statute, the words should be taken in their usual and popular sense, unless they have a well-understood technical meaning.—Ex parte McCoy, Cal., 101 Pac. 419.

114. **Street Railroad**—Collision.—It is the duty of a person in control of a wagon standing on a public street by the side of a street railroad track to so place and manage it as not to expose persons on passing cars to danger from collision with the wagon.—Monumental Brewing Co. v. Larrimore, Md., 72 Atl. 596.

115.——Last Clear Chance.—If motorman could have avoided injury to plaintiff by due care after he was observed to be in danger, a verdict for plaintiff was proper.—Wichita R. & Light Co. v. Liebhart, Kan., 101 Pac. 457.

116.——Right of Traveler.—A traveler and a motorman in charge of a street car held rightfully traveling on the public streets, and each must employ reasonable care to avoid a collision.—Dahmer v. Metropolitan St. Ry. Co., Mo., 118 S. W. 496.

117. **Trespass to Try Title**—Burden of Proof.—A plea of not guilty as to the part of land not disclaimed by defendant put plaintiff on proof of his title, and on his failure to show title, defendant would be entitled to a judgment denying a recovery of the land not disclaimed.—Gaffney v. Clark, Tex., 118 S. W. 606.

118. **Trusts**—Foreclosure.—Where the vendee, after foreclosure of a vendor's lien, continued in possession, it would be presumed that the purchaser held the land for the vendee.—Howard v. Howard, Ky., 118 S. W. 367.

119. **Usury**—Recovery.—A person who loaned the money, who received all the interest paid, and who owns the notes given for the loan, is the only necessary or proper party in an action at law to recover usurious interest together with the penalty imposed by the act of 1905 Laws 1905, p. 172 (Ann. St. 1906, Sec. 3708).—Snyder v. Crutcher, Mo., 118 S. W. 489.

120. **Vendor and Purchaser**—Rescission.—Where the sale of land was rescinded by agreement of the parties on the discovery that by mutual mistake the land described in the deed was not the land intended to be conveyed, the purchaser cannot afterward claim any interest in the land actually described.—McMillan v. Morgan, Ark., 118 S. W. 407.

121.——Unrecorded Deed.—A purchaser for value without notice of a prior unrecorded deed can convey a good title to one having notice thereof.—Foster v. Bailey, S. C., 64 S. E. 423.

122. **Wills**—Parol Evidence.—Parol evidence held admissible to show what lands testator had, to aid in the construction of his will disposing of his lands.—McMahan v. Hubbard, Mo., 118 S. W. 481.

123.——Provisions Against Contest.—A provision of a will forfeiting devises to any person who shall contest the will is favored by public policy, and applies to contests on the ground of insanity.—In re Hite's Estate, Cal., 101 Pac. 443.

124. **Work and Labor**—Damages Caused by Excavating.—A landowner held bound to pay a contractor for labor and materials expended in supporting and protecting his soil and buildings from damage caused by excavating on the adjoining lot.—Ceffarelli v. Landino, Conn., 72 Atl. 564.